

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF(PJC)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S MOTION FOR PROTECTIVE ORDER
REGARDING THE TYSON DEFENDANTS' SUBPOENAS SEEKING DISCOVERY
BEYOND THE APRIL 16, 2009 DISCOVERY CUT-OFF**

Expedited Consideration Requested

Plaintiff, the State of Oklahoma ("the State"), pursuant to Fed. R. Civ. P. 16 and 26, respectfully moves this Court for a protective order disallowing the Tyson Defendants' subpoenas seeking discovery beyond the April 16, 2009 discovery cut-off. In support of this Motion, the State states:

1. This Court's Scheduling Order set April 16, 2009 as the cut-off for discovery. *See* DKT #1658.
2. Although it has granted certain limited extensions of this deadline for specific discovery for good cause shown, the Court has otherwise repeatedly stated that the April 16, 2009 cut-off is firm. *See, e.g.*, DKT #1942 ("The deadline for all discovery other than the depositions of Defendants' damages experts is and remains April 16, 2009"); DKT #1979 ("The Court reminds the parties that the discovery deadline of April 16, 2009 still stands, except for the May 15, 2009 deadline for the State's depositions of Defendants' damages experts, and no additional extensions of that deadline will be permitted without leave of this Court"); DKT

#1706 ("the court has admonished all parties that extensions of the scheduling order would be rarely granted, and only upon unforeseeable good cause").

3. Despite the clarity of these admonitions by the Court, on April 16, 2009, the Tyson Defendants mailed by certified mail subpoenas *duces tecum* to Florida A&M University and Florida State University. *See* Ex. 1. These two subpoenas are returnable on May 4, 2009 -- 18 days after the discovery cut-off.

4. Subpoenas such as these constitute discovery and are therefore subject to the April 16, 2009 discovery cut-off. *See, e.g., Rice v. United States*, 164 F.R.D. 556, 558 (N.D. Okla. 1995); *see also Gavenda v. Orleans County*, 182 F.R.D. 17, 20 (W.D.N.Y. 1997) ("discovery requests are to be made sufficiently inside the discovery period to allow for a response prior to the discovery cut-off date. Discovery requests which are served too late in the discovery period to allow for a timely response, have been disallowed") (Rule 34 context).

5. In order to comply with this Court's April 16, 2009 discovery cut-off, these subpoenas were required to be returnable prior to April 16, 2009. *See, e.g., Oldenkamp v. United Am. Ins. Co.*, 2008 U.S. Dist. LEXIS 96446, *7 (N.D. Okla. Nov. 26, 2008) ("The subpoenas at issue seek document production after the Oct. 3 discovery deadline. Such discovery is untimely. Plaintiff's Motion for Protective Order is GRANTED"); *Marvin Lumber & Cedar Co. v. PPG Industries, Inc.*, 177 F.R.D. 443, 445 (D. Minn. 1997) ("Accordingly, we grant the Plaintiffs' informal Motion to the extent of prohibiting the Defendant from serving, or enforcing, Subpoenas *duces tecum* which have a return date after [the discovery cut-off date]"); *Moore's Federal Practice - Civil*, § 45.03[2] ("because a reasonable time must be provided to comply with a subpoena, a discovery subpoena should be served a reasonable time in advance of the expiration of the discovery deadline so that compliance may be obtained before expiration").

6. The Tyson Defendants did not seek leave to conduct this discovery beyond the discovery cut-off. The purported basis for this untimely discovery is to inquire into Dr. Teaf's qualifications as an expert. *See* Ex. 2 (4/19/09 e-mail from Tyson Defendants' counsel). There can be no valid reason why the Tyson Defendants waited until April 16, 2009, to attempt to set this discovery in motion. The fact that Dr. Christopher Teaf would be a testifying expert in this matter has been known to the Tyson Defendants for more than a year now. He was disclosed as an expert on April 1, 2008. His expert report, together with his CV, was disclosed on May 14, 2008. He was deposed on his expert report on July 30-31, 2008. Moreover, Dr. Teaf was also deposed in connection with the State's motion for preliminary injunction on January 31, 2008. Defendants have had more than sufficient opportunity to inquire into Dr. Teaf's qualifications as an expert.

7. "[S]cheduling orders must mean something if the parties and the court are ever to achieve some sort of finality." *ADC Telecommunications, Inc. v. Thomas & Betts Corp.*, 2001 WL 1381098, *4 (D. Minn. Oct. 18, 2001)). Indeed, "[a]ll good things, including discovery, must come to an end." *United States v. Taylor-Vick*, 513 F.3d 228, 233 (5th Cir. 2008); *see also CarboMedics, Inc. v. ATS Medical, Inc.*, 2008 U.S. Dist. LEXIS 106636, *30 (D. Minn. April 16, 2008) ("Discovery must end sometime; this time has come"). The State needs to turn its attention to pretrial preparations. Continued discovery is an unnecessary distraction and unfairly prejudices the State. *See, e.g., Marvin Lumber*, 177 F.R.D. at 445 ("to allow a party to continue with formal discovery -- that is, discovery which invokes the authority of the Court -- whether in the guise of Rule 45, or any of the other discovery methods recognized by Rule 26(a)(5), after the discovery deadline unnecessarily lengthens the discovery process, and diverts the parties' attention, from the post-discovery aspects of preparing a case for Trial, to continued involvement

in the discovery, and in the nondispositive Motion process. We can find no plausible reason to exempt Rule 45 discovery from the time constraints that are applicable to all of the other discovery methods recognized by the Federal Rules of Civil Procedure").

8. In short, these two subpoenas clearly violate this Court's scheduling order. Their issuance was improper, they prejudice the State, and the State is entitled to protection.

9. The State has met and conferred with the Tyson Defendants in good faith, but was unable to resolve this dispute without the Court's involvement.

WHEREFORE, premises considered, the State's motion for a protective order disallowing the two subpoenas to Florida A&M University and Florida State University should be granted, and the Court should grant such other relief as is just and equitable pursuant to the Federal Rules of Civil Procedure.

Respectfully Submitted,

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